

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUNEARTH, INC.; and THE SOLARAY  
CORPORATION,

Plaintiffs,

v.

SUN EARTH SOLAR POWER CO., LTD.;  
NBSOLAR USA, INC.; and DOES 1-10,

Defendants.

No. C 11-4991 CW

ORDER GRANTING  
PLAINTIFFS' MOTION  
TO STRIKE  
DEFENDANTS'  
AFFIRMATIVE  
DEFENSES  
(Docket No. 91)

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Plaintiffs SunEarth, Inc. and The Solaray Corporation move to strike the affirmative defenses of Defendants Sun Earth Solar Power Company, Limited (SESP) and NBSolar USA, Inc. Defendants oppose Plaintiffs' motion. Having considered the arguments presented by the parties in their papers and at the hearing, the Court GRANTS Plaintiffs' motion, STRIKES Defendants' affirmative defenses, and GRANTS Defendants leave to amend.

BACKGROUND

On October 11, 2011, Plaintiffs initiated this trade name and trademark infringement action, alleging that Defendants have misappropriated and infringed Plaintiffs' "Sun Earth" trademark, service mark and trade name.

On November 8, 2011, Defendants filed their answer to Plaintiffs' complaint, pleading as affirmative defenses that "Plaintiffs' claims are barred by laches and estoppel," without elaboration. Answer, Docket No. 23, 4.

On January 26, 2011, the parties filed a joint case management statement, stating that a disputed legal issue was

1 whether laches bars Plaintiffs' claims. Joint Case Management  
2 Statement, Docket No. 55, 9. Estoppel was not mentioned.

3 On March 13, 2012, after this Court granted Plaintiffs leave  
4 to do so, Plaintiffs filed their first amended complaint (1AC).  
5 Docket No. 81.

6 On March 27, 2012, Defendants filed their answer to the 1AC  
7 and included counterclaims for unfair competition based on common  
8 law and California statute. Docket No. 84. Defendants again  
9 included as affirmative defenses that "Plaintiffs' claims are  
10 barred by estoppel and laches," without elaboration. Id. at 6.

11 On April 5, 2012, Plaintiffs filed their answer to  
12 Defendants' counterclaims. Docket No. 85. On the same day,  
13 Defendants filed an amended answer to the 1AC, removing their  
14 counterclaims completely but making no other alterations. Docket  
15 No. 86. Defendants again asserted that "Plaintiffs' claims are  
16 barred by estoppel and laches," without elaboration. Id. at 6.

17 On April 26, 2012, Plaintiffs filed the instant motion to  
18 strike. Docket No. 91.

#### 19 DISCUSSION

##### 20 I. Timeliness of Plaintiffs' Motion to Strike

21 Federal Rule of Civil Procedure 12(f) states that a party may  
22 make a motion to strike material from a pleading "either before  
23 responding to the pleading or, if a response is not allowed,  
24 within 21 days after being served with the pleading."

25 It is undisputed that Plaintiffs filed their motion to strike  
26 within twenty-one days of being served with the amended answer to  
27 the 1AC. Defendants argue that Plaintiffs' motion to strike is  
28 nonetheless untimely because it was not filed within twenty-one

1 days of November 8, 2011, when Defendants first asserted their  
2 affirmative defenses. In support, Defendants cite cases in which  
3 courts have denied a motion to strike as untimely when it was  
4 filed a long time after the filing of the pleading it challenged,  
5 but do not provide authority in which a court has done so when a  
6 motion to strike a pleading was filed within the applicable time  
7 period after service of that pleading, because the material it  
8 sought to strike was also contained in an earlier version of the  
9 pleading.

10 At least one other judge in this District has rejected  
11 Defendants' argument as "unpersuasive." See Raychem Corp. v. PSI  
12 Telcoms., 1995 U.S. Dist. LEXIS 22325, at \*5 (N.D. Cal.). This  
13 Court agrees that Defendants' argument is unavailing. As  
14 previously stated, Rule 12(f) allows a party to file a motion to  
15 strike "within 21 days after being served with the pleading," and  
16 the operative pleading was served exactly twenty-one days before  
17 Plaintiffs filed their motion to strike. Thus, Plaintiffs' motion  
18 is timely.

19 Further, even if Plaintiffs' motion were untimely, this Court  
20 retains the discretion to consider the arguments they raise sua  
21 sponte. Rule 12(f) allows the court to act "on its own" without a  
22 time restriction. Thus, a number of courts have found they may  
23 properly consider arguments raised in an untimely motion to strike  
24 under this rule. See, e.g., Williams v. Jader Fuel Co., 944 F.2d  
25 1388, 1399 (7th Cir. 1991); Abarca v. Franklin County Water Dist.,  
26 2009 U.S. Dist. LEXIS 42609, at\*16 (E.D. Cal.); United States v.  
27 Global Mortg. Funding, Inc., 2008 U.S. Dist. LEXIS 102897, at \*6  
28

(C.D. Cal.). Accordingly, the Court will reach the merits of Plaintiffs' motion.

## II. Motion to Strike

Plaintiffs argue that Defendants have not adequately plead the factual basis for their laches and estoppel affirmative defenses under either the pleading standard set forth in the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), or the less rigorous standard set forth in Wyshak v. City Nat'l Bank, 607 F.2d 824, 826 (9th Cir. 1979).

Rule 8 requires that, when "responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it." Federal Rule of Civil Procedure 8(b). Rule 12(f) provides that, on its own or on a motion from a party, a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Federal Rule of Civil Procedure 12(f). "The purposes of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues." Barnes v. AT&T Pension Benefit Plan--Nonbargained Program, 718 F. Supp. 2d 1167 (N.D. Cal. 2010) (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)).

Like the other judges in this district who have considered the issue, this Court has recently held that "the heightened pleading standard set forth in Twombly and Iqbal also applies to affirmative defenses." Powertech Tech., Inc. v. Tessera, Inc., 2012 U.S. Dist. LEXIS 68711, at \*13 (N.D. Cal.). See also Perez v. Gordon & Wong Law Group, P.C., 2012 WL 1029425, at \*6 (N.D.

1 Cal.) (Koh, J.); Barnes & Noble, Inc. v. LSI Corp., 2012 WL  
2 359713, at \*2 (N.D. Cal.) (Chen, J.); Bottoni v. Sallie Mae, Inc.,  
3 2011 WL 3678878, at \*2 (N.D. Cal.) (Beeler, M.J.); Dion v. Fulton  
4 Friedman & Gullace LLP, 2012 WL 160221, at \*2 (N.D. Cal.) (Conti,  
5 J.); J & J Sports Productions, Inc. v. Mendoza Govan, 2011 WL  
6 1544886, at \*1 (N.D. Cal.) (Alsup, J.); Barnes, 718 F. Supp. 2d at  
7 1171-72 (Patel, J.). Because Defendants' affirmative defenses  
8 include only conclusory allegations, without providing any  
9 information about the grounds upon which they rest, they have  
10 insufficiently plead these defenses as required to provide fair  
11 notice under either this standard or the earlier Wyshak standard.  
12 Thus, the Court GRANTS Plaintiffs' motion to strike.

13 Defendants ask that the Court either amend their pleadings to  
14 conform to the details that they set forth in their prior filings,  
15 or grant them leave to amend. They also provide a copy of their  
16 proposed amendment to their laches affirmative defense.

17 The authority that Defendants cite does not establish that  
18 the Court itself may amend their answer as Defendants have  
19 requested. Further, even if the Court had the authority to do so,  
20 it is not clear how the Court could construe Defendants' prior  
21 filings to allege their affirmative defenses properly; none of the  
22 documents to which Defendants point discusses estoppel or provides  
23 allegations that would put Plaintiffs on notice of the grounds for  
24 an affirmative defense on that basis.

25 The Court, however, will grant Defendants leave to amend  
26 their affirmative defenses. If a defense is struck, "[i]n the  
27 absence of prejudice to the opposing party, leave to amend should  
28 be freely given." Wyshak, 607 F.2d at 826. Plaintiffs do not

1 contend that granting Defendants leave to amend would prejudice  
2 them. Instead, they argue that Defendants' proposed amendment is  
3 insufficient as a matter of law to allege the affirmative defenses  
4 properly, in that it contains only allegations similar to the  
5 laches defense that Defendants asserted in opposition to  
6 Plaintiffs' motion for a preliminary injunction, which the Court,  
7 in granting the preliminary injunction, found unlikely to succeed,  
8 and that amendment would therefore be futile. However, that the  
9 defense is not likely to succeed on its merits does not  
10 necessarily mean that it is futile to allege.

11 CONCLUSION

12 For the reasons set forth above, the Court GRANTS Plaintiffs'  
13 motion to strike Defendants' affirmative defenses (Docket No. 91).  
14 Defendants are granted leave to file their amended affirmative  
15 defenses within seven days of the date of this Order; Defendants  
16 may file their proposed amended affirmative defense or may file a  
17 different amended estoppel and/or laches defense. If Plaintiffs  
18 file a motion challenging the sufficiency of Defendants'  
19 amendment, they shall not repeat any of the arguments regarding  
20 futility made in their reply to this motion.

21 IT IS SO ORDERED.

22  
23 Dated: 6/19/2012

24   
25 CLAUDIA WILKEN  
26 United States District Judge  
27  
28